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ABSTRACT

The law has developed extensive rights and procedural safeguards that allow for the removal of overly disruptive and dangerous students while also protecting students from arbitrary and wrongful disciplinary action. This report describes New Jersey legislation intended to support fairness in discipline. Part 1 examines: sources of authority for school discipline; duty to prevent suspension and expulsion; grounds for suspension and expulsion; distinctions between suspension and expulsion; procedural requirements; discipline rules for various types of assault, gun possession at school, and gun conviction; removal from school due to suspected substance abuse; search and seizure; loss of privileges and community service; what to do at board of education disciplinary hearings; the appeal process; alternative education and home instruction during long-term suspension, expulsion, and removal; grades and academic credit; student records; corporal punishment; and liability for unconstitutional suspension or expulsion. Part 2 examines the rights of children with disabilities in discipline matters; e.g., the school district's affirmative obligation to address behavioral problems, right to stay put during discipline proceedings, procedures, and services for short-term suspensions, appropriateness of interim alternative educational setting, right to bring complaints challenging discipline under the Individuals with Disabilities Education Act, and emergency relief. (SM)

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FAIRNESS IN SCHOOL DISCIPLINE: THE RIGHTS OF PUBLIC SCHOOL STUDENTS

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FAIRNESS IN SCHOOL DISCIPLINE

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PART I

INTRODUCTION

Student discipline involves the balancing of two interests: on the one hand is the fundamental right of all students to a public education; on the other hand, is the right of all students to a safe and orderly environment in which teachers can teach and students can learn.To accommodate these two interests, the law has developed extensive rights and procedural safeguards which allow for the removal of overly disruptive and dangerous students, while at the same time protecting students from arbitrary and wrongful disciplinary action.

SOURCES OF AUTHORITY FOR SCHOOL DISCIPLINE

The New Jersey Constitution guarantees every child between the ages of five and eighteen the right to a thorough and efficient public education. N.J. Const. Art. VIII, § 4, para. 1; see also N.J.S.A. 18A:38-1, et seq., granting a student a statutory entitlement to enroll in the school district in which he or she resides. The law governing school discipline is found in state and federal statutes, court decisions and New Jersey Commissioner of Education and New Jersey State Board of Education decisions.[1]In New Jersey, the primary source of authority for schools to discipline students is state statute, N.J.S.A. 18A:37-1, et seq. The statute contains limited detail and guidance.It mainly covers some, but not all, of the grounds for removing a student, and it does not address procedures for imposing discipline.The law governing proper discipline procedures is found in the decisions of the United States Supreme Court, New Jersey state courts, the Commissioner of Education and the State Board of Education.The right to procedural protections in student discipline is grounded primarily in the due process clause of the Fourteenth Amendment to the United States Constitution.
With the exception of special education, the New Jersey Department of Education has not promulgated regulations implementing state and federal laws governing student discipline.Consequently, student discipline varies from district-to-district, and the constitutional right to a public education is not adequately protected.In the area of special education, the federal Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq., contains extensive procedural requirements for the discipline of students with disabilities.New Jersey has incorporated these requirements into its special education code.N.J.A.C. 6A:14-2.8.
In addition to state statute and case law, all school districts should have rules of conduct which govern student behavior and discipline.These rules specify prohibited behaviors and the consequences for such behaviors.Students must be given a copy of these rules and regulations.

DUTY TO PREVENT SUSPENSION AND EXPULSION

Because a student's right to a public education is guaranteed under New Jersey's Constitution, a school district may suspend or expel a student from school only after it has made every reasonable effort to address the student's behavior problem, and only upon the competent advice of its school psychologist, social worker, guidance counselor or other appropriate experts. Scher v. West Orange Board of Education, 1968 S.L.D. 92, 96-97.Causes of student misbehavior may include: an undetected disability, unchallenging classwork, or a stressful home/community environment.Before suspending or expelling a disruptive student, school staff should first try corrective remedial measures, such as parent conferences, positive behavioral supports, which may include a behavior modification plan, school-based counseling, and referral to appropriate social services.
School districts are required to have procedures for intervention and referral services for all students who are experiencing behavior difficulty in school.N.J.A.C. 6:26-2.1.Additionally, school districts must

have specific programs in place for evaluation, intervention and referral to treatment for students whose use of alcohol or other drugs affects school performance. N.J.S.A. 18A:40A-9, et seq.; N.J.A.C. 6:29-6.3.School staff must also make a referral for a special education evaluation when it reasonably believes that a student's continued inappropriate behavior may stem from a disability. N.J.A.C. 6A:14-3.3.

GROUNDS FOR SUSPENSION AND EXPULSION

Under New Jersey statute, a student may be suspended or expelled for "good cause," which includes, but is not limited to, any of the following conduct:

- continued and willful disobedience
- open defiance of authority
- stealing
- damaging school property
- occupying or causing others to occupy the school building without permission
- causing other students to skip school
- possessing, using or being under the influence of illegal drugs or alcohol in the school building or on school grounds
- trying to injure or injuring another student, a teacher, someone who works for the school, or a school board member
- posing a danger to himself/herself, to other students, or to school property -- even if conduct occurs away from school grounds
- conviction or adjudication of delinquency for possession of a gun, or a crime while armed with a gun, on school property, on a school bus, or at a school function

- knowingly possessing a gun while on school property, on a school bus, or at a school function [N.J.S.A. 18A:37-2; N.J.S.A. 18A:37-2.1; N.J.S.A. 18A:37-8; R.R. v.Board of Educ. of Shore Reg'l High Sch. District, 109 N.J. Super. 337, 344 (Ch. Div. 1970)(holding that students may be disciplined for behavior off school grounds if behavior poses a direct danger to self or others)].

The statutory list of grounds for expulsion/suspension does not cover the range of behaviors that could constitute "good cause" for exclusion from school. At the very least, principles of due process should require that prohibited conduct be specified in a local board of education student code of conduct, although the Commissioner has upheld expulsion/suspension for reasons not contained in a local code, finding that "any act may subject a pupil to punishment where the act is detrimental to good order and to the best interest of the school or where it adversely affects school discipline." McB v. Washington Tp. Board of Educ. 96 N.J.A.R. 2d (EDU) 298, 306.

DISTINCTIONS BETWEEN SUSPENSION AND EXPULSION

A short-term suspension is removal of a student from his/her regular education program for up to ten days.A suspension of more than ten days is a long-term suspension.An expulsion occurswhen a student is barred from attending school either permanently or for a specified long-term period, such as one year. As discussed in the following sections of this manual, separate procedural safeguards apply depending on whether the discipline is a short-term suspension, a long-term suspension or an expulsion.For example, while a short-term suspension may be imposed by a school principal,a long-term suspension or an expulsion may be imposed only by the local board of education following a formal disciplinary hearing.

Short- or long-term suspension may be imposed in-school or out-of-school. In- school suspension involves removing the student from his/her regular school program and placement in a room within the school building with a supervising adult.Most districts provide instruction to students during periods of in-school suspension, in which case the adult supervising the suspension must be a certified teacher. David Dowding v. Board of Educ. of Tp. of Monroe, 1990 S.L.D. 1711, 1713 (State Board of Education decision). According to the Commissioner of Education, there is no legal distinction between in-school and out-of-school suspension, since both involve the temporary cessation of a pupil's right to attend the regular school program.R.W. v. Somerville Board of Educ., 1988 S.L.D. 2333, 2350-2351. Accordingly, a student placed on in-school suspension must be provided with all of the procedural protections normally granted in out-of-school suspension cases.Id.

PROCEDURAL REQUIREMENTS FOR SUSPENSIONS OF TEN DAYS OR LESS

A principal or his/her designee has the authority to impose a short-term suspension.N.J.S.A. 18A:37-4. A student facing short-term suspension is entitled to the following procedural due process protections

1) Oral or written notice of what he/she is accused of doing and the factual basis for the accusation;
2) An explanation of the evidence on which the charges are based, if the student denies the charges;
3) An informal hearing or meeting with the superintendent, principal, or other school administrator before being removed from school, during which the student and his/her parent have the opportunity to explain the student's side of the story and request leniency in punishment.The hearing may immediately follow the notice.

[Goss v.Lopez, 419 U.S. 565, 95 S.Ct.729 (1975)].

PROCEDURAL REQUIREMENTS FOR LONG-TERMSUSPENSIONS AND EXPULSIONS

Only a board of education, not principals, superintendents or other school district employees, may impose a long-term suspension (suspension of more than ten days) or an expulsions.N.J.S.A. 18A:37-5.A student facing long-term suspension or expulsion is entitled to the following procedural due process protections:

1) Prior to removal from school, all of the procedural protections provided to a a student facing short-term suspension (notice, information concerning the charges against the student, an opportunity to meet with a school administrator to explain his/her side of the story).However, if a student causes a serious disruption to the school or presents a danger to him/her self or other people or property, he/she may be removed immediately, and the notice and informal hearing may be provided immediately following removal;

2) A formal hearing to be held before the local board of education or a committee of the board within 21 days of suspension. R.R., supra, 109 N.J.Super. at 350 (unless the discipline case involves assault against school personnel, assault with a weapon, or an incident with a gun, in which case the hearing must be held within 30 days, see pp. of this manual;

3) Before the hearing, the board of education must provide the student withwritten notice of:
--the specific charges which would allow the school to suspend or expel him/her, R.R. supra, 109 N.J. Super. at 349;
--the witnesses who will appear against him/her at the hearing, as well as a report of the facts to which the witnesses will testify, id., Tibbs v. Board of Education of Tp. of Franklin, 114 N.J. Super. 287, 293-294 (App. Div. 1971), aff'd 59 N.J. 506 (1971);
--the student's right to defend himself/herself and to bring anattorney to the hearing, id.;
4) At the hearing, the student must be given the opportunity to:
--defend himself/herself by explaining his/her side of the story;
--bring witnesses to testify on his/her behalf;
--present signed statements by witnesses on his/her behalf;
--face and question the witnesses for the school, unless "compelling circumstances" bar the production of the witness.R.R., supra, 109 N.J. Super. at 349Tibbs v. Board of Educ. of Tp. of Franklin, 114 N.J. Super. at 293-296.

5) If a committee of the school board holds the discipline hearing, the school board as a whole must receive and consider a detailed written report of the hearing before taking any final action against the student,R.R., supra, 109 N.J. Super. at 349; L.T. v.Long Branch City Board of Educ., 96 N.J.A.R. 2d (EDU) 125, 131;

6) The board's discipline hearing must be held at a session closed to the public in order to protect the privacy of the pupil and his/her family.However, the board must take its final vote on the discipline in public.M.W. v.Board of Freehold Reg'l High Sch. District, 1975 S.L.D. 127, 132.

DISCIPLINE RULES FOR ASSAULT AGAINST SCHOOL PERSONNEL, ASSAULT WITH A WEAPON, GUN POSSESSION AT SCHOOL AND GUN CONVICTION

Under New Jersey and federal law, additional procedures and rules applyto discipline cases involving assault against school personnel and school board members; assault with a weaponagainst school personnel, school board member or another student; possession of a gun at school, on a school bus, or at a school function; and conviction or adjudication of delinquency for an offense involving a gun at school, on a school bus, or at a school function.A student accused of one of these offenses is first entitled to the same procedural protections as a student facing long-term suspension and expulsion.In addition, the following rules apply:

1) The school must immediately suspend the student from school until the school board holds a formal hearing.N.J.S.A. 18A:37-2.1; N.J.S.A. 18A:37-2.2; N.J.S.A. 18A:37-7;

2) The school board must hold a formal hearing within 30, not 21 , calendar days of the suspension.N.J.S.A. 18A:37-2.1(a); N.J.S.A. 18A:37-2.4(b); N.J.S.A. 18A:37-10(b);

3) The school board's decision on the imposition of discipline must be made within five days of the close of the hearing.N.J.S.A. 18A:37-2.1(a); N.J.S.A. 18A:37-2.4(c); N.J.S.A. 18A:37-10(c);

4) If the board finds that the student has committed one of these offenses, the board can do one of three things: (1) reinstate the student to the regular education program, except in cases involving a gun offense, see point 5, below; (2) continue the suspension for a specific period of

time; or (3) expel the student from the regular education program;

5) One Year Removal For Guns: Under the Zero Tolerance for Guns Act, N.J.S.A. 18A:37-7, et seq., a board of education is required to order a one year removal from school for any student who is found to have possessed a gun at school, on a school bus or at a school function, or who has been convicted, or adjudicated delinquent, of a gun offense while at school, on a school bus, or at a school function.However, the school district's superintendent is authorized to exercise his or her discretion to shorten this time period, depending upon the facts of the case.

6) Return to The Regular Education Program Following Suspension/Expulsion: The board of education determines the length of suspension for a student whocommits an assault, without a weapon, against school personnel or a school board member. For students suspended or removed from school for a specified period due to assault with a weapon other than a gun; possession of a gun on school grounds, on a school bus, or at a school function; or conviction or adjudication of delinquency for a gun offense at school, on a school bus, or at a school function, the district's superintendent, not the school board, makes the determination ofwhether and when a student is ready to return to the regular education program.N.J.S.A. 18A:37-2.5; N.J.S.A. 18A:37-11.According to state statute, the superintendent is supposed to make this determination "in accordance with procedures to be established by the Commissioner of Education."Unfortunately, the Commissioner has never established these procedures, and there are no state standards to guide a superintendent's decision to readmit a student.

REMOVAL FROM SCHOOL DUE TO SUSPECTED SUBSTANCE ABUSE

Local boards of education are required to have policies and procedures for theevaluation, intervention, and referral to treatment for students whose use of alcohol or other drugs has affected their school performance, or who possess, consume or are suspected of being under the influence of alcohol, controlled dangerous substances, or any chemical which causes intoxication, such as glue, at school or a school function.N.J.S.A. 18A:40A-9, et seq.; N.J.A.C. 6:29-6.1, et seq.Whenever a member of the school staff suspects that a student may be under the influence of one of these substances, he/she must immediately report the suspicion to the school principal, or the principal's designee, who, in turn, must notify the student's parent or guardian and the superintendent of schools, and arrange for the immediate examination of the student to determine whether the student is under the influence.The examination may be conducted by either the district's medical inspector (school physician) or a doctor selected by the student's parent or guardian.If the medical inspector or student's doctor are not immediately available, the student must be taken to the nearest hospital emergency room, accompanied by a member of the school staff, and the student's parent or guardian, if available.If the student is examined by a doctor chosen by the parent or guardian, the parent or guardian are responsible for the cost of the examination; if the student is examined by the district's medical inspector or at the emergency room, the board of education assumes the cost.N.J.A.C. 6:29-6.5(a)(3). Within twenty-four hours of the examination, the physician is required to issue a written report of his/her findings to the parent or guardian of the student, the principal, and the district's superintendent or other chief school administrator.In the event a written report of the examination is not issued within twenty-four hours, the student must be returned to school until a positive diagnoses of alcohol or other drug use is received.If there is a positive diagnosis of alcohol or other substance use, the student must be removed from school until such time as the parent or guardian, principal and superintendent obtain a written report from a physician certifying that substance abuse no longer interferes with student's physical and mental ability to perform in school.The written report must be prepared by a physician who has examined the pupil to diagnose alcohol or other drug use.N.J.A.C. 6:29-6.5(a)(7).

The law does not specify whether the school district or parent or guardianbear the cost of the second examination and report certifying that the student is fit to return to school, but it follows from the other section of the law that if the district chooses the physician to perform the follow-up examination, it bears the cost; if the examination is performed by a doctor chosen by the parent or guardian, the parent or guardian pay.Unfortunately, the law does not impose a time frame by which the school district must obtain the follow-up examination and report.Assuming the student is no longer under the influence of alcohol or another substance and is fit to return to school, parents and guardians will need to either obtain the report at their own expense, or insist that the school district act immediately to obtain the report.

These special provisions in the law allowing the immediate removal of a student under the influence of alcohol or another substance are separate from, and in addition to, a local school district's rules of conduct and discipline policies.In addition to removing a student and barring his/her return to school until a proper medical certification is obtained, a local district may, in accordance with district policy and procedure,impose short- or long-term discipline upon a student who uses alcohol or other substances at school or at a school function.

SEARCH AND SEIZURE

The issue of searching students for illegal contraband (drugs, alcohol, weapons) or evidence of a breach of the law or school rules involves a balancing of a school's duty to maintain a safe and orderly learning environment and a student's right to privacy.The law governing student search and seizure is

complex and constantly evolving.The following is a summary of the general principles.
In 1985, the United States Supreme Court issue a landmark ruling, New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985), holding that the Fourth Amendment prohibition against unreasonable searches and seizures applies in public schools. The Court devised a two-part test for evaluating the legality of a student search.First, was the search justified at its inception?Second, was the search conducted in an appropriate manner, that is, was the actual search reasonable in its scope, duration, and intensity?
A search is constitutionally justified at its inception if school officials have reasonable grounds - based on all of the circumstances - for suspecting that the search will reveal evidence that the student has violated, or is violating, either the law or school rules.Reasonable suspicion is a subjective measure that is based on specific facts; it requires less evidence than the probable cause standard used by police, but more than a mere hunch or unsubstantiated rumor.
A search by school officials will be reasonable in its scope and intensity when it is reasonably related to the objectives of the search and is not excessively intrusive in light of the age and sex of the student and the nature of the suspected infraction. State statute, N.J.S.A. 18A:37-6.1, expressly prohibits any teaching staff, principal or other educational personnel from conducting a strip search or body cavity search of a pupil under any circumstance.
A school official may always ask for permission to conduct a search, even if the official does not have reasonable grounds to believe that the search would reveal evidence of an offense or infraction.To be valid, a student's consent to search must be clear and unequivocal, and must constitute a knowing and voluntary waiver of constitutional rights.A student's refusal to give permission to search may not be considered evidence of guilt.
Local school boards are required to have policies and procedures setting forth specific procedures for, and responsibilities of, staff in initiating and conducting searches and seizures of pupils and their property.N.J.A.C. 6:29-10.3(b)(4). Additionally, local districts must have policies and procedures which ensure cooperation between school staff and law enforcement authorities in all matters relating to the possession, distribution and disposition of unlawful drugs and weapons, including specific procedures for summoning appropriate law enforcement authorities onto school property for the purpose of conducting law enforcement investigations, searches, seizures, and arrests. N.J.A.C. 6:29-10.(b)(3).Note that when police and other law enforcement authorities are involved in a search and seizure, higher standards, such as probable cause, will apply.
In contrast to searches of specific individuals or locations, general or suspicionless searches are either targeted against an identifiable group of students, such as student athletes, or are planned events that are designed to respond to serious security and discipline problems, and to discourage students from bringing or keeping dangerous weapons, drugs, alcohol, and other prohibited items on school grounds.These suspicionless programs are sometimes referred to as "sweep" "dragnet" or "blanket" searches.The legal issues concerning the appropriate use of general searches are not settled, and are beyond the scope of this manual.A parent encountering a problem with a school search may want to contact the New Jersey office of the American Civil Liberties Union (ACLU), located in Newark, New Jersey, at (973) 642-2086.

LOSS OF PRIVILEGES AND COMMUNITY SERVICE

School district's will often impose a loss of privilege, such as participation in an extra-curricular activity or participation in a graduation ceremony, as a part of school discipline.Many school district's have a separate code of conduct for student athletes which condition participation in a school sport on compliance with all school and district rules and regulations.Since a student has no right under state law to participate in extracurricular activities, or even to attend a graduation ceremony, school districts are not required to provide any particular procedural protections when imposing a loss of privilege. The Commissioner of Education has consistently upheld a local board's decision to withhold a privilege as a form of student discipline, provided the board has not acted arbitrarily or irrationally. See e.g. C.S. v. Board of Educ. of Lower Camden County Reg'l High Sch., Commissioner Slip Opinion,OAL Dkt. No. EDU 605-98, July 8, 1998 (findingstudent's drug possession a legitimate basisto barstudent's attendance at graduation ceremony).
The Commissioner has also upheld a board of education's imposition of performance of service for the benefit of the school community as a consequence for violation of school rules.J.E., et al. v. New Milford Board of Educ., OAL Dkt No. EDU 9514-00, Commissioner Slip Opinion dated December 1, 2000 (upholding imposition of twenty hours of scrubbing defaced desks, cleaning school grounds and collecting leaves for failing to report vandalism which students witnessed.)

WHAT TO DO AT A BOARD OF EDUCATION DISCIPLINE HEARING

A parent, family friend, lay advocate or lawyer may act as an advocate for a student at a board of education discipline hearing. There are three general goals to be accomplished at the hearing, either separately or in combination: (1)establishingthe student's innocence; (2) challengingthe board's authority to impose discipline due to its failure to follow proper procedural protections; and (3) requesting lenient or alternative discipline instead of long-term suspension or expulsion.
Concerning the first goal, establishing the student's innocence,the school bears the burden of proving by a preponderance of evidence that the student committed the offense.H.A. v. Board of Education of Warren Hills Regional School District, 1976 S.L.D. 336, 340. The student, or his/her representative, has the right to question and confront the board of education's witnesses in an effort to establish the student's innocence.For example, if the witness claims that the student committed an assault, the student can ask whether the witness went to the hospital, received medical attention or has any other proof of injury.If the witness has no such proof, the student can argue that the witness' testimony is not supportable or credible.

The board of education cannot base its decision on hearsay evidence (a witness' testimony based on what he/she was told by someone else, rather than what he/she saw or knows first hand).Only people with first-hand, personal knowledge should be allowed to testify.A student has the right to object to any hearsay evidence, and if the board hears only hearsay evidence, the student should ask that the discipline complaint be dismissed.Also, the witness must appear in person before the board to present his/her testimony; the board cannot simply rely on a witness' written statement.Tibbs, supra, 114 N.J. Super. at 293-294.

A parent must decide whether his/her child will testify at the hearing.If the student was arrested for the same incident involved in the disciplinary proceeding, it may not be in the student's interest to testify.Statements made at the discipline hearing could be used against the student in the criminal case.If the student has an attorney in the criminal case, he/she should be consulted before the student testifies at the board of education hearing.If the student was not arrested, a parent must still decide whether the student's testimony will help or hurt.If the student is innocent and can clearly explain what happened, it might help to have him/her explain the incident.On the other hand, if the student is charged with something he/she did do, is confused about the facts, or simply is unable to clearly explain the incident, his/her testimony could hurt the case.The student must tell the truth when he/she testifies, and will have to admit guilt.The student has a constitutional right to not testify against him/herself, and the school bears the burden of proving the case against the student.Allowing the student to testify could make it easier for the school to prove its case.

Another goal at the board of education hearing may be to show that the school or board of education committed procedural errors which entitle the student to a dismissal of the complaint.For example, if the principal did not hold a preliminary hearing (meeting with the student and student's parent) at the time of, or immediately following, the suspension,and the student was not given the opportunity to explain his/her side of the story, thestudent can urge that the complaint be dismissed due to theschool's violation of the his/her due process rights.

The third goal at the board of education hearing may be to show that the form of discipline proposed by school administrators is inappropriate for the particular student, or too harsh in relation to the offense.A board of education may impose long-term suspension or expulsion only as a last resort, after all other attempts to remedy the student's inappropriate behavior have failed.Scher, supra, 968 S.L.D. at 96-97.Further, long-term suspension and expulsion may be imposed only upon the advice and recommendation of the district's professional staff.Id. If the student does not have a history of serious behavioral problems, he/she should argue that the incident does not warrant the harsh penalty of long-term suspension or expulsion, and that he/she deserves another chance.On the other hand, if the student has a history of school discipline infractions, but school officials have made no effort to correct the inappropriate behavior through, for example, counseling services, peer mediation, or a positive behavioral plan, the student should argue that the board lacks authority to impose long-term suspension or expulsion.If the student committed a serious offense and the board of education is considering permanent expulsion, he/she should argue for placement in an alternative school setting.See p. of this manual.

APPEAL PROCESS

A student has the right to a appeal a disciplinary decision of a school administrator or the board of education.First, a student may appeal if his/her procedural rights have been violated during the discipline process.The Commissioner of Education has consistently held that a board of education's failure to comply with discipline procedural requirements is grounds for reversal of the decision of a board, and for the student'simmediate reinstatement to school.L.T. v. Long Branch Board of Education, 96 N.J.A.R. 2D (EDU) 125; C.F. v. City of Wildwood Board of Education, 96 N.J.A.R. (EDU) 619; citing R.R., supra.

Second, a student may appeal if he/she believes the discipline was not justified, either because the board made incorrect factual findings, or because the discipline was too harsh in relation to the offense.The student in such a case bears the heavy burden of proving that the action of the local school board was arbitrary, without rational basis, or induced by improper motive. Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 294 (App. Div. 1960).In C.S. v. Board of Education of Piscataway Tp., 97 N.J.A.R. 2d (EDU) 573, 577, Commissioner of Education overruled a local board of education expulsion order, in part, because the board acted arbitrarily and unreasonably by failing to take into account the student's young age - twelve years old.

The steps for appeal of a discipline decision are as follows:
Principal Suspensions (Ten days or less):
Principal suspensions are appealed to:
(1) the district superintendent; then to
(2) the school board; then to
(3) the New Jersey Commissioner of Education; then to
(4) the State Board of Education; then to
(5) Superior Court of New Jersey-Appellate Division

School Board Suspensions and Expulsions:

School board suspensions or expulsions are appealed to:
(1) the New Jersey Commissioner of Education; then to
(2) the State Board of Education; then to
(3) Superior Court of New Jersey-Appellate Division

Superintendent Decision Regarding Return of A Student Removed For A Weapons Offense:
Superintendent decisions regarding a student's readiness to return to the regular education program are appealed to:
(1) the New Jersey Commissioner of Education; then to
(2) the State Board of Education; then to
(3) Superior Court of New Jersey-Appellate Division

Filing An Appeal With The Commissioner

An appeal to the Commissioner of Education must be filed within ninety days of the local board of education's action.Under N.J.A.C. 6A:3, filing an appeal requires:

(1) Preparing a document known as a "petition."A petition must include the name and address of the person filing the appeal (known as the "petitioner"), and the fact that the petition is being filed "on behalf of" a student.A petition must include the name and address of the board of education named as "respondent."The respondent in a discipline case would be the board of education imposing the discipline.A petition must also contain a statement of the specific allegations and essential facts supporting those allegations, which explain why the petitioner is disputing the school board's determination.This statement must be verified by oath.If possible, the petitioner should also identify the section of the law under which the petition is brought.For example, if the petition deals with discipline for an alleged assault on a teacher, the petition must cite N.J.S.A. 18A:37-2.1.

(2)Serving the petition on the respondent board of education.Once the petition is prepared, the petitioner must make copies for the board, the Commissioner, and him/herself.The board must get a copy of the petition.To confirm that this has been done, the petitioner is required to file a "proof of service" with the petition. After serving a copy of the petition on the local board of education, the original and two copies of the petition and proof of service are filed with the Commissioner at the following address:
State Commissioner of Education
c/o Director of Controversies and Disputes
New Jersey Department of Education
P.O. Box 500
Trenton, NJ 08625-0500

If possible, a copy of the papers should also be sent by facsimile transmission to the Controversies and Disputes office at tax number (609) 292-4333.That office can be reached by telephone at (609) 292-5705 to answer questions about filing.
The local board of education will have twenty days from the date of service to respond to the petition.Once the board's answer is served on the petitioner and filed with the Commissioner, the case will be scheduled for a hearing before an Administrative Law Judge who makes an initial decision.The case then goes to the Commissioner for a final decision.
A decision by the Commissioner may be appealed to the State Board of Education within 30 days of the decision.A decision by the State Board of Education is a final agency decision which may be appealed to New Jersey Superior Court- Appellate Division in accordance with New Jersey Court Rules, N.J.Ct.R. 2:2-1, et seq.

ALTERNATIVE EDUCATION AND HOME INSTRUCTION DURING LONG-TERM SUSPENSION, EXPULSION AND REMOVAL

The only school districts in New Jersey with an explicit requirement to offeralternative education programs are the 30 poor urban and rural districts covered by the New Jersey Supreme Court's ruling in Abbott v. Burke, 153 N.J. 480, 515 (1998) (Abbott V).No otherdistricts are required by statute, regulation or case law to have alternative education programs.Some counties run alternative education programs in which local districts place students, and some school boards provide home instruction or placement in an appropriate alternative education program following long-term suspension and expulsion. However, there are not enough alternative education programs in the state to meet the needs of all students who require an alternative placement, and many boards of education provide no education services whatsoever to students following long-term suspension and expelsion.While there is no clearly established right to alternative education under New Jersey law, a strong argument is being pursued by advocates to establish this right for all students.The right to alternative education stems from a student's fundamental right under the New Jersey constitution to a thorough and efficient education up to the age of 18 years,N.J. Const., Art. VIII, § 4, para. 1,and statutory right under the school residency statute, N.J.S.A. 18A:38-1,et seq., to attend school in the district of residence until age 20. On a case by case basis, the Commissioner of Education has recognized a student's continuing right to a public education after long-term suspension or expulsion.In C.S. v. Board of Educ. of Piscataway Tp., supra, the Commissioner ruled that a local board of education in an expulsion case must "consider, investigate and effectively utilize the local- and county-based alternative education program options which are available," because removal from the regular education program "does not absolutely terminate a student's entitlement to an education within the district."97 N.J.A.R.2d (EDU) at 577.Similarly, in cases involving long-term suspension, the Commissionerruled that a board of education should offer "some kind of opportunity to keep up with classwork ... during such period, either at home, after school hours, in another school, or by other suitable means,"Scher, supra 1968 S.L.D. at 96; see also, T.M. v. Board of Educ. of Lower Camden Reg'l High Sch. Dist., 1977 S.L.D. 284; H.A. v. Board of Educ. of Warren Hills Reg'l Sch. Dist., 1976 S.L.D. 336; R.B. v. Board of Educ. of Trenton, 1974 S.L.D. 415; Diggs v. Board of Educ. of City of Camden, 1970 S.L.D. 225. While these cases indicate an entitlement to some type of education following long-term suspension and expulsion, the right has been extended only to individual students who have challenged a local board of education decision to the Commissioner of Education, and has not been universalized to apply to all students.Further, the Commissioner has failed to specify the components of an adequate alternative education program, in particular, a requirement that such programs meet the state's academic standards contained in the Core Curriculum Content Standards. Placement in an alternative education program is explicitly required by state statute only for students who are subject to a one-year "removal" from school for (1) assault with a weapon against school personnel or another student; and (2) possession of a gun on school property, on a school bus, or at a school function, or conviction or adjudication of delinquency for a crime involving a gun on school property, on a school bus, or at a school function.N.J.S.A. 18A:37-2.2; N.J.S.A. 18A:37-8.In these circumstances, if placement in an alternative education program is not available, the student must be provided with home instruction or another suitable program until placement is available. Id. State statutedoes not specify the components of an alternative or other "suitable" education program.

GRADES AND ACADEMIC CREDIT

Teachers may not lower grades or marks as punishment for absences due to suspension.Wetherell v.Board of Educ. of Tp. of Burlington, 1978 S.L.D. 794, 798; Wermuth v. Board of Educ. of Livingston, 1965 S.L.D. 121.A student must be given the opportunity to make up the work missed due to suspension, and teachers must grade the make-up work as if it had been completed on time.Babbit v.Moran, 1974 S.L.D. 145.Additionally, absences due to suspension cannot be included in the computation to determine compliance with school attendance policy. C.G. v. Board of Educ. of David Brearly High Sch., 1980 S.L.D. 1178.

RECORDS

School districts are not required to record an incident of suspension or expulsion in a student's records, although they are permitted to keep such record.N.J.A.C. 6:3-6.3.If a student believes he/she has been unjustly or incorrectly disciplined, or that the record of such discipline is inaccurate, he/she may have the reference to the incident expunged from his/her school records, or modified.N.J.A.C. 6:3-6.7.

To appeal a school record, the parent of a student, or an adult student, must first write a letter of appeal to the district's superintendent setting forth the issues and requested action.The superintendent must respond to the letter within ten days.If the parent or adult pupil are not satisfied with the superintendent's response, he/she may appeal to either the board of education or the New Jersey Commissioner of Education within ten (10) days.The decision of the board of education may be appealed to the Commissioner in accordance with the procedure and form described in this manual in "Filing An Appeal With The Commissioner."

Regardless of the outcome of a student's appeal of discipline records, a student has the right to place a statement in his/her record commenting upon the record and setting forth any reason for disagreement with the action of the school district or board of education.

CORPORAL PUNISHMENT

Under New Jersey law, school staff may not use physical force to discipline a student unless it is reasonable and necessary to prevent physical injury to others, to obtain possession of weapons or other dangerous objects, in self defense, or for the protection or persons or property.N.J.S.A. 18A:6-1.

LIABILITY FOR UNCONSTITUTIONAL SUSPENSION/EXPULSION

School authorities may be liable for money damages in suits brought by students under the Civil Rights Act of 1871, 42 U.S.C. § 1983, for suspension or expulsion which violate the student's constitutional rights.If the school board member or official knew, or reasonably should have known, that the student was removed from the school without following proper procedure in violation of his/her constitutional due process rights, or in violation of any other constitutional right, such as free speech, the school official and the school board may be held liable.Wood v.Strickland,95 S.Ct.992, 1001 (1975). In general, a school board and its employees will be protected from liability only if they acted in good faith.Butz v.Economou, 98 S.Ct. 2894, 2908 (1978); T.L.O. v.Engrud, 94 N.J. 331, 349 (1983).

PART II
THE RIGHTS OF CHILDREN WITH DISABILITIES IN DISCIPLINE MATTERS

Children who are eligible for special education are entitled to special protections in the areas of discipline and behavior programs. The law recognizes that the behavior of these children is sometimes the result of their disability, and that schools often exclude children because of behavioral disorders. IDEA, the federal law governing the provision of special education, aims to keep children with disabilities in school to the maximum extent possible, and offers specific procedural protections in the area of discipline. The law also recognizes that it is in the interest of society to continue to educate children with disabilities even after expulsion or long-term suspension. For this reason, IDEA grants a child with a disability the right to a free appropriate public education (FAPE) and educational services, even after expulsion and suspension.

The rules about special education discipline are very complicated.Unfortunately, this complexity often results in school districts disciplining students without following the rules.It is very important, therefore, that parents learn and understand these rules, and demand their school district's full compliance.These rules apply to all situations in which a school district bars a child with a disability from attending school or his/her current education program due to violation of school rules or behavioral problems, even if the school does not call the removal a "suspension" or "expulsion."

It is also very important to keep in mind that children with disabilities are entitled to all of the procedural due process protections, discussed in Part I of this manual, which every child must receive when facing a short- or long-term removal from school.

School District's Affirmative Obligation To Address Behavioral Problems

Under IDEA, school districts must address a child's challenging behavior before discipline even becomes an issue.School districts are required to have qualified teachers, social workers, counselors, psychologists and other professionals who are trained and knowledgeable about developing and implementing positive behavior strategies and plans for children with disabilities.20 U.S.C. § 1412 (A)(14); 20 U.S.C. § 1453(c)(3)(D)(v). Additionally, the IEP team, which develops the Individualized Education Program (IEP) for the child, must address the child's behavioral issues in the IEP.IEP teams are required to explore the need for strategies and support systems, including positive behavioral interventions, to address any behavior that may impede the learning of the child or the learning of his/her peers.20 U.S.C. § 1414(d)(3)((B)(i); 34 C.F.R. 300.346 (a)(2)(I); N.J.A.C. 6A: 14-3.7(c)(3).A failure toconsider and address behavioral problems in developing and implementing a child's IEP constitutes a denial of FAPE.

In addition to positive strategies and interventions, the behavioral section of the IEP should address whether and under what circumstances the child may be subject to loss of privileges or short-term suspensions for violation of school rules.

Functional Behavioral Assessment and Behavioral Intervention Plan

School districts are required to conduct a functional behavioral assessment (FBA) and implement a behavioral intervention plan for children with behavioral problems in school.20 U.S.C. § 1415(k)(1)(B)(i); 34 C.F.R. 300.520(b)(1)(i)-(ii).A FBA is a study of the relationship between a student's challenging behavior and the environment.The purpose of a FBA is to determine:

- in what environment the behavior occurs
- why the behavior occurs
- when the behavior is most likely and least likely to occur
- the behavior's function for the student (what the student gets) which continues or lessens the behavior

The general idea of an FBA is that problem behavior is a response to environmental factors (things

going on in the classroom, such as the teacher's response to the behavior), and that controlling or changing the environment will lead to changes in the challenging behavior.A FBA should be conducted by a psychologist or other professional trained in behavior assessment and behavioral plans.The IEP team, working with the behavioral expert, uses the information gathered through the FBA to develop an appropriate behavior intervention plan.Examples of behavioral interventions include providing social skills instruction, helping a student gain self awareness of a problem behavior, or creating environmental modifications.

The Right to "Stay Put" During Discipline Proceedings

If school officials believe that a child's placement is inappropriate and causing discipline problems for the child, their first response should be to work with the parents and teacher through the IEP and placement processes to develop a more appropriate program which meets the needs of the child and improves the learning environment for other students.If the child's parent does not agree to the program or placement changes proposed by the school district, he/she can contest the changes through mediation or due process.As in all other situations where there is a dispute between the school district and parent, there can be no change in the classification,IEP, or placement of the child during the pendency of mediation or due process, provided the parental request for mediation or due process is made in writing within fifteen calendar days of the school district's written notice of a proposed action.20 U.S.C. § 1415(j); N.J.A.C. 6A:14-2.3(f)(2). This is referred to as the child's right to "stay put" during the pendency of a dispute.The child's placement may change during the pendency of mediation or due process only if the parent and school district agree to a change, or an ALJ orders a change.
The right to stay put applies for the vast majority of students facing discipline.20 U.S.C. § 1415(j). The following discipline procedures under IDEA, which allow school districts to impose, in very limited circumstances, long-term suspension and expulsion without agreement from the parents, are basically exceptions to the "stay put" rule.

Important Distinction Between Short-Term Suspension and Suspension as a Change In Placement

The exact procedures and the amount and types of educational services which a school district must provide to a student depends on whether the suspension is a short-term removal or a change in placement.A change in placement removal is, essentially, a long-term suspension, a series of short-term suspensions that constitute a pattern of removal, or an expulsion.A student is entitled to greater procedural protections and services if the removal is a change in placement rather than a short-term removal.
A "short-term" removal is a suspension of 10 or fewer consecutive school days (school days in a row), and additional removals of 10 or fewer days in the same school year for separate incidents of misconduct, as long as the removals beyond the first 10 days are not part of a pattern of exclusion.20 U.S.C. § 1415(k)(1)(A)(i); 34 C.F.R. 300.520(a)(1)(i).
A "change in placement" suspension is any removal of more than 10 consecutive school days, or a series of removals that amount to more than 10 school days in a school year, and form a pattern of exclusion from school.34 C.F.R. 300.519; N.J.A.C. 6A14-2.8(b).A determination of whether a suspension is part of a pattern of exclusion must be made on a case-by-case basis, and depends on consideration of such factors as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.New Jersey's special education regulations exclude parents from the decision of whether a series of removals constitutes a pattern of exclusion, and instead leave the determination to school administrators acting in consultation with the student's case manager.N.J.A.C. 6A:14-2.8 (b)(2)(i).While federal lawdoes not specify the parties responsible for making this decision, the procedural rights granted under IDEA seem to require that the decision be made at a meeting of the IEP team, which includes the child's parent.See34 C.F.R. 300.501(a)(2), granting parents the right to participate in a meeting with the school district with respect to the educational placement ofthe child and the provision of FAPE to the child.A parent faced with what appears to be a pattern of exclusion should request an immediate IEP meeting with the child study team so a joint determination may be made about whether a series of suspensions constitutes a pattern of exclusion.A parent also has the option of requesting mediation, due process or emergency relief to challenge a school district's determination regarding whether a series of removals constitutes a pattern of exclusion, and therefore a change in placement.

EXAMPLES:

Short-Term Suspension:A child violates school rules by fighting with another student.In accordance with district policy, the child may be suspended for up to 10 consecutive school days.
Short-Term Suspension: The same child who has already been suspended for 10 school days faces another five day suspension for violation of school rules three months after the initial suspension.The facts of the suspensions were reviewed by a school administrator, and a decision was made that the second removal did not constitute a change in placement.
Change In Placement:The same child who already had a 10 daysuspension and a 5 day suspension in the school year is faced with another 10 daysuspension two weeks after the last suspension.The school principal, in consultation with the student's case manager, decides that the third removal, which is only

two weeks after the last removal and amounts to a total of 25 days out of school in a three and a half month period, is a change in placement, thereby entitling the child to the greater procedural protections granted forlong-term suspensions.
Change In Placement:A child is suspended for 15 days for fighting.The suspension constitutes a change in placement.

Procedures and Services for Short-Term Suspensions

For all suspensions, including those of 10 days or less, the school principal is required to provide the child study team case manager with a written description of the incident and the reasons for the suspension.N.J.A.C. 6A14-2.8(a).School officials may suspend a child with a disability for 10 consecutive school days or lesswithout offering any educational services, if services are not provided to a child without a disability in similar circumstances, 34 C.F.R. 300.121(d)(1), N.J.A.C. 6A14-2.8(a)(1), and without following the detailed discipline procedures which apply to change in placement removals, 34 C.F.R. 300.520(a)(1).Additionally, school officials may suspend a child for more than 10 non-consecutive days in a school year without following the procedures for long-term discipline, as long as the suspension beyond 10 days in the school year is not part of a pattern of exclusion from school and does not amount to a "change in placement."
However, for any suspension which amounts to more than 10 days in a school year, the school district must provide educational services.34 C.F.R. 300.121(d)(2); N.J.A.C. 6A:14-2.8(d).Thus in the previous short-term suspension examples, no educational services are required in the first example, and educational services are required in the second example during the second suspension of five days.As long as the suspension is not part of a pattern of exclusion from school, a school administrator, such as the principal, acting in consultation with the child's special education teacher and case manager, decides the level of educational services necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the IEP.34 C.F.R. 300.121(d)(3)(I); N.J.A.C. 6A:14-2.8 (d)(1).Again, while it appears that state and federal regulations allow school officials to make this decision without input from the student's parents, parents should insist on an IEP team meeting to discuss educational services during periods of suspension, and may request mediation and due process to challenge a school district decision on the level or appropriateness of services during such period.
Whenever a school district imposes a series of short-term suspensions that add upto more than 10 days in the school year, the IEP team must meet.This meeting must take place within 10 business days of the last suspension (the 11^{th} day of suspension in the school year.)Again, in the previous short-term suspension examples, the IEP team does not have to meet after the 10 day suspension given in the first example, but is required to meet in the second example because the second suspension of five days culminates to more than 10 days out of school that school year.The meeting must take place within 10 business days of the first day of the second suspension.The purpose of the meeting is to develop a behavioral assessment plan, if the district has not already conducted a functional behavioral assessment and implemented a behavioral intervention plan for the child.A behavioral assessment plan is a plan for how the FBA will be conducted. Then, as soon as practicable after developing the plan and conducting the assessment, the IEP team must meet to develop appropriate behavioral interventions necessary to address the child's behavior.34 C.F.R. 300.520(b)(2).If the child being removed for the 11^{th} cumulative day in a school year already has a behavioral intervention plan, the IEP team must meet within 10 business days of the removal to review the plan and its implementation, and modify the plan as necessary to address the child's behavior.34 C.F.R. 300.520(b)(1)(ii).The IEP team does not have to meet again to review and revise a behavioral plan in response to additional suspensions in the school year, unless the additional suspension amounts to a change in placement, or any team member, including the parent, requests a meeting.34 C.F.R. 300.520(b)(1)(ii).
The IEP team does not have to meet to conduct a manifestation determination, discussed below, for a removal of less than 10 days, or a removal that amounts to more than 10 non-consecutive days in a school year, as long as the suspension beyond 10 days in the school year is not part of a pattern of exclusion from school and does not amount to a "change in placement."

Procedures and Services for a Change-in-Placement Suspension (Long-Term Removal or Expulsion)

School districts are allowed to impose a change in placement (suspension for more than 10 consecutive school days, or suspension for more than 10 non-consecutive days in a school year which is part of a pattern of exclusion) for discipline reasons, without a parent's consent, in three narrow circumstances, and only if they comply with very specific procedural requirements.A district may impose a change in placementif:

- The IEP team conducts a manifestation determination and finds that the student's inappropriate behavior was not caused by or related to his or her disability
- The student brings a weapon to school or a school function, or knowingly uses, possesses, sells, or solicits illegal drugs while at school or a school function (an "illegal weapon" is defined as a weapon that is used for, or readily capable of, causing death or serious bodily injury)
- The district requests an emergency due process hearing and proves by substantial evidence that the student is substantially likely to cause injury to him or herself or others in the current educational placement

In every case in which a school district imposes a change in placement, the IEP team must meet within 10 business days of the removal or the decision to impose removal and perform two separate functions: (1) develop a behavioral assessment plan and behavioral intervention plan, or, in the case of a child who already has a behavioral intervention plan,review and modify the plan as necessary to address the child's behavior, 20 U.S.C. § 1415(k)(1)(B)(i)-(ii); 34 C.F.R. 300.520(b)(1)-(2) (see discussion of behavioral intervention plan on pp. **; and (2) conduct a manifestation determination, 20 U.S.C. § 1415(k)(4)(A); 34 C.F.R.300.523(a)(2), discussed below.The IEP team can perform these two functions at one or more meetings, as necessary.34 C.F.R. 300.523(e).

Change in Placement Following Manifestation Determination

Essentially, a school district is allowed to expel or suspend long-term a child with a disability only if the child's breach of school rules is not caused by or related to his or her disability. IDEA,Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and case law, S-1 v. Turlongton, 635 F.2d 342 (4th Cir. 1981), recognize that if a child's disability is the cause of his or her inappropriate conduct, the child should not be punished with long-term removal or expulsion from school. The process of assessing the relationship between a child's disability and the behavior which is the subject of the discipline is called a manifestation determination. 20 U.S.C. § 1415(k)(4).

If a school district is considering long-term removal of a child, and that removal amounts to a change in placement, it must, on the day it makes a decision to take such action, send the parent a written notice of its decision with a copy of the procedural safeguards notice (PRISE). 34 C.F.R. 300.523(a)(1). Immediately, and not later than 10 school days from its decision, the district must schedule a meeting of the IEP team to determine whether the child's behavior was a manifestation of his/her disability. 34 C.F.R. 300.523(a)(2). The manifestation determination must be conducted by the IEP team and other qualified personnel, and must take place at a meeting. 34 C.F.R. 300.523(b).

In making a manifestation determination, the IEP team must consider all relevant information, including evaluations, diagnostic results, information supplied by the parent, observations of the child, the child's IEP and the child's placement.34 C.F.R. 300.523(c)(1).The team may find that the behavior that is the subject of the discipline is not a manifestation of the child's disability, and may impose an expulsion or long-term suspension, only if it finds:

- In relationship to the behavior, the child's IEP and placement were appropriate, and that special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the IEP and placement;
- The child's disability did not impair his or her ability to understand the impact and consequences of his or her behavior; and
- The child's disability did not impair his or her ability to control the behavior.

34 C.F.R. 300.523(c)(2)(I)-(iii).

If the IEP team finds that any of these standards were not met, the behavior must be considered a manifestation of the child's disability, and the school district may not impose an expulsion, long-term suspension, or any removal that amounts to a change in placement.34 C.F.R. 300.523(d).In the case of a dangerous student, or a student involved with weapons or illegal drugs, however, an ALJ or a district may impose a 45 day removal to an appropriate interim alternative educational setting, as discussed below.

The school district must take immediate steps to remedy any problems with the child's IEP or placement, or in their implementation, which are discovered in the course of the manifestation determination.34 C.F.R. 300.523(f).

If the IEP team determines that the child's behavior was not a manifestation of his or her disability, it may take steps to discipline the child in the same manner in which children without disabilities are disciplined - that is - the child may be suspended or expelled in accordance with the policies and procedures of the district board of education.34 C.F.R. 300.524(a). The IEP team must transmit the child's special education records to the board of education for its consideration during the discipline proceedings.34 C.F.R. 300.524(b).

The school district must continue to provide FAPE to children who are expelled or suspended long-term. 20 U.S.C. § 1412(a)(1)(A); N.J.A.C. 6A:14-1.1(b)(1). The IEP team, which includes the child's parent, is responsible for determining the services necessary to enable the child to appropriately progress in the general curriculum and advance toward achieving the goals of the IEP.The IEP team also determines where those services will be provided.34 C.F.R. 300.121(d)(3)(ii); N.J.A.C. 6A:14-1.1(d)(2).

2. Change in Placement for Illegal Drugs or Weapons

A school district may impose a removal, without agreement from the parent, to an appropriate interim alternative educational setting for not more than 45 days if a child brings a weapon to school or a school function, or knowingly uses, possesses, sells or solicits illegal drugs while in school or at a school function. 20 U.S.C. § 1415(k)(1)(A)(ii)(I)- (II); 34 C.F.R. 300.520(a)(2)(I)-(ii).A " weapon" is defined as a dangerous weapon that is used for, or readily capable of, causing death or serious bodily injury.20 U.S.C. § 1415(k)(10)(D).

The IEP team, which includes the child's parent, determines the appropriate interim alternative educational setting.34 C.F.R. 300.522(a).The educational setting must enable the child to continue to progress in the regular school curriculum, although in another setting, and to continue to receive the services and modifications, including those described in the child's current IEP, that will allow the child

to meet the goals set out in the IEP.34 C.F.R. 300.522(b)(1).Additionally, the interim setting must include services and modifications to address the behavior that led to the removal, and which are designed to prevent the behavior from recurring.34 C.F.R. 300.522(b)(2)

Remember: For any change in placement removal, including a 45-day removal to an interim educational setting for illegal drugs or weapons, the IEP team must meet within 10days of the removal to develop or review and modify a behavioral intervention plan, discussed in this manual at pp. **, and to conduct a manifestation determination. If the IEP team determines that the student's involvement with illegal weapons or drugs was not a manifestation of his or her disability, he or she may be expelled or suspended long-term as any other child would be under school district policy (although the district must continue to provide FAPE.)On the other hand, the IEP team may determine that the student's involvement with illegal drugs or weapons was a manifestation of his or disability, in which case the student cannot be expelled or suspended long-term.The IEP team should, of course, address the student's behavior through changes in his or her IEP or placement.

As with any suspension or removal for more than 10 consecutive days, when a child is removed to a 45-day interim educational setting due to weapons or drugs, the due process clause of the United States Constitution requires that the student be granted a full hearing before the board of education, at which time he or she can contest the facts that led to the removal.While the board of education does not have authority to review the district's compliance with the special education laws (those issues are appealed through the due process procedures), the board must conduct an evidentiary hearing and determine (1) whether the student did in fact commit the alleged weapons or drug offense; and (2) whether the proposed expulsion or long-term suspension is allowed under, and in accordance with, written board of education policy.The board of education hearing must be held within 21 days of the removal if the offense involves illegal drugs, and within 30 days of the removal if the offense involves weapons. R.R. v. Board of Education of Shore Regional H.S., supra, 109 N.J. Super. at 349;N.J.S.A. 18A:37-10(b). See, Part I of this manual.

1.Change in Placement Ordered by a Hearing Officer

The third and final grounds on which a district may impose a change in placement removal, without agreement from the parent, is when the placement is ordered by an ALJ in an emergency due process hearing. An ALJ has the authority to order a child's placement in an appropriate interim alternative educational setting for not more than 45 days if a school district requests an emergency due process hearing and proves by substantial evidence that the child is substantially likely to cause injury to him or herself or others in the current educational setting.20 U.S.C. § 1415(k)(2)(A).(The term substantial evidence means beyond a preponderance of evidence, 20 U.S.C. § 1415(k)(10)(C).) It is impermissiblefor a school district to act on its own to bar a child from school on the grounds of alleged dangerousness.If a district believes a child does not belong in school because he or she is a danger to him or herself or others, it must obtain an order from an ALJ allowing the removal.AnALJ may order such a removal only if he or she:

- determines that the school district meets its burden of proving "substantially likely to cause substantial injury";
- considers the appropriateness of the child's current placement;
- considers whether the school district has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services;
- determines that the interim alternative educational setting being proposed by school personnel, in consultation with the child's special education teacher, will enable the child to continue to progress in the curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will allow the child to meet the goals set out in the IEP. Additionally, the interim setting must include services and modifications to address the behavior that led to the removal, and which are designed to prevent the behavior from recurring.

20 U.S.C. § 1415(k)(2)(A)-(D); 34 C.F.R. 300.521(a)-(d).

If the school district has not done everything reasonably possible to change the student's behavior, or to protect the student and others from possible injury, the ALJ should not order removal to the interim educational setting, and should instead order the district to implement appropriate interventions and strategies for addressing the student's behavior. For example, the ALJ may order the district to assign an aide to accompany the student throughout the day, or to allow the student a supervised "time out" from the classroom when his or her behavior is escalating. Similarly, the ALJ should not order placement in the interim educational setting if the setting does not offer the student the services and modifications required under the child's current IEP, will not allow the student to progress and meet the goals of the IEP, or does not offer a program or services which address the student's challenging behavior.

There has been a great deal of litigation on the issue of when a student may be removed from school on the grounds of dangerousness. The following is a summary of some of the relevant case law:

Proving Substantially Likely to Cause Injury

1. Light v. Parkway C-2 School District, 41 F.3d 1223 (8th Cir. 1994)(test of whether there is a substantial risk of injury is an objective one; school district met test by documenting 11 to 19 aggressive acts per week over a two year period, including biting, hitting, kicking, throwing objects.)

2. Texas Independent School District v. Jorstad, 752 F.Supp. 231, 238 (S.D. Tex. 1990)(court granted injunctive relief finding that student posed a "severe and on-going threat of imminent danger to himself and to others" and that the student behaved in a "virtually constant" manner that was dangerous to himself and others.

3. Horry County School District v. P.F., 29 IDELR 354 (D.Ct. S.Car. 1998)(student with "long history of

self-injurious behavior and harm to others, including head-banging, rectal digging, biting, hurling of objects, hitting, kicking, clawing, spitting, overturning furniture, destroying property and making threatening statements, including threatening to kill staff and other students" was "presently, and ... at all times relevant to this proceeding, substantially likely to injure herself and others in a local school setting."

4. School District of Philadelphia v. Stephan M. and Theresa M., 25 IDELR 506, 508 (E.D. Pa. 1997)(school district failed to meet burden of proving substantially likely to cause injury where student had only one incident of misconduct - using a razor blade to cut the hand of another student who had provoked her - and no other record of disciplinary infractions.)

5. Phoenixville Area School District v. Marquis B., 25 IDELR 452 (E.D. Pa. 1997)(hitting three other students and shoving principal against the wall in a three month period, while "clearly not appropriate" did not "rise to the level of demonstrating a substantial likelihood of causing injury in the immediate future.")

6. Clinton County R-III School District v. C.J.K., 896 F.Supp. 948, 950 (W.D. Mo. 1995)(injunctive relief removing student denied where student made repeated threats of violence to school officials and other students, but never acted on threats.)

7. M.P., by D.P. v. Governing Board of the Grossmont Union High School District, 858 F.Supp. 1044, 1050 (S.D. Cal. 1994)(knocking down bookshelf, fighting with another student, throwing modeling clay, insubordination and bringing a gun to school [prior to 1997 IDEA Amendments] were insufficient to demonstrate substantial likelihood of injury to self or others.)

8. Cabot School District, 27 IDELR 304 (SEA Ark. 12/9/97)(a verbal threat to kill assistant principal did not meet standard of substantially likely to cause injury.)

9.Scranton School District, 29 IDELR 133 (SEA PA. 6/22/98)(aggressive acts, Including threatening and foul language, throwing furniture, punching at teacher andthrowing a box of Jell-O at teacher, never resulted in injury to anyone; therefore, district did not meet burden of proving substantially likely to cause injury.)

10.East Orange Board of Education v. A.M.J. and A.N.J., AOL Dkt No. EDS 5115-99 (May 11, 1999)(shouting obscenities, leaving class without permission, and kicking chairs, while clearly not appropriate, do not constitute physical threats or dangerousness.)

Proving Reasonable Efforts to Minimize Risk of Harm

1. Light v. Parkway C-2 School District, 41 F.3d 1223 (8th Cir. 1994)(school district met burden of proving that it had done all it reasonably could do to reduce risk of injury where student was accompanied throughout the school day by one full-time teacher and a full-time teacher's assistant, andextensive training and support had been provided to the teacher and aide, including assistance of inclusion facilitators, behavior management specialists, special education consultants, and crisis prevention trainers.)

Appropriateness of Interim Alternative Educational Setting

1. Oregon City School District, 28 IDELR 96 (SEA Or. 4/23/98)(although district met burden of proving student substantially likely to cause injury, school district ordered to return student to his placement prior to removal because proposed interim placement, one-on-one instruction with virtually no contact with peers and other educators, did not meet IDEA requirements for an interim placement.)

2. Hempfield School District, 27 IDELR 406 (SEA Pa. 10/20/97)(hearing officer rejected interim setting because school district failed to prove that settingincluded services and modifications designed to address the "target behaviors.")

3. Palisade Park Board of Education v. J.M., OAL Dkt No. EDS 9677-99 (September 17, 1999)(home instruction not an appropriate interim placement as it is "not designed as a dumping ground for children who are too disruptive to remain in mainstream classes.")

The Right to Bring a Complaint Challenging Discipline under IDEA

IDEA grants a parent of a child with a disability three mechanisms to resolve a dispute with a school district over student discipline: mediation, administrative due process hearing, which can include a request for emergency relief, and complaint investigation.For a detailed discussion of these complaint resolution procedures, see Education Law Center's publication "The Right to Special Education in New Jersey: A Guide for Parents."

A parent may file a complaint challenging an interim educational setting, a manifestation determination, a school district's decision that a removal is not part of a pattern of exclusion, or any noncompliance with the discipline procedures of IDEA. N.J.A.C. 6A:14-2.7(g).

Due Process

Most commonly, special education discipline disputes are resolved through due process proceedings.

(Note: due process is the same proceeding invoked by a school district when it seeks to remove a child from school on the grounds that the child is dangerous, N.J.A.C. 6A:14-2.7(h) see discussion on pp. of this manual.) A due process hearing is a formal, trial-like hearing before an ALJ at the New Jersey Office of Administrative Law ("OAL").N.J.A.C. 6A:14-2.7(a).The ALJ in a due process hearing listens to and accepts evidence and legal arguments from both the parent and the school district.Within 45 days of therequest for due process, the ALJ writes a formal written decision which must summarize the evidence in the case and explain the reasons for the decision.N.J.A.C. 6A:14-2.7(e).Due process hearings in discipline cases must be expedited, which means the hearing must be held within 10 days of the filing of the due process request, and no extension beyond the 45 days for final decision is allowed. N.J.A.C. 6A:14-2.7(g), (h). The ALJ's decision is a final decision which is binding on both parties.The decision must be implemented without delay, even if one of the parties files anappeal of the decision.The New Jersey Department of Education has the authority to enforce a due process hearing decision.N.J.A.C. 6A:14-2.7(n).Parents and the school districts have the right to appeal an unfavorable due process decision to either the New Jersey Superior Court or federal district court.

A due process hearing is requested by writing to the Director, Office of Special Education Programs, New Jersey Department of Education, PO Box 500, Trenton, New Jersey 08625-0500.The request must include the student's name and address, the school the student is attending, and a description of the problem at issue, including relevant facts, and a proposed resolution of the problem and the relief sought.The due process request must note that a copy of the request has been sent to the other party (the school board).N.J.A.C. 6A:14-2.7(c).The New Jersey Department of Education has developed a form for requesting due process, mediation and emergency relief, a copy of which is in this manual at p. *.

Emergency Relief

Since a discipline dispute may involve removal from school or placement in an inappropriate setting, a request for due process may include a request for emergency relief on behalf of the student.Emergency relief is available when a child needs a speedy resolution of a dispute in order to avoid some serious harm.Emergency relief may be requested as part of a request for due process hearing to the Director of OSEP or, if the parent has already requested due process and the case has been transmitted to the OAL, through a written application to the ALJ.A request for emergency relief must be supported by an affidavit or notarized statement setting forth the basis for the request.The parent must provide a copy of the request to the other party (the school board), and the request for emergency relief must note that a copy was sent. N.J.A.C. 6A:14-2.7(l).

To prevail in an application for emergency relief, a parent must prove: (1) a reasonable probability of winning the case, that is, a parent must show that the facts and law indicate that she will ultimately win after a full hearing in the case; (2) the child will suffer irreparable harm if the relief is not granted; (3) the relief requested is narrowly defined to prevent specific harm and will not cause unreasonable expense and substantial inconvenience to the school board. N.J.A.C. 6A:14-2.7(m)(1).

It is very important to remember that a school board may not impose a long-term removal unless it first conducts a manifestation determination and finds that the student's behavior was not related to his or her disability, or unless it files for due process and an ALJ finds that the student is dangerous and likely to cause substantial injury to him or herself or others.When a school board removes a student without complying with these procedural requirements and the parent is seeking immediate reinstatement to school, the parent must file for emergency relief, but does not bear the burden of provinglikelihood of success on the merits, irreparable harm and a narrowly tailored remedy, as outlined above.Rather, the due process and emergent relief application should seek reinstatement to school solely on the basis of the student's right to stay put during the pendency of a dispute about placement.See discussion of stay put on p. *of this manual.

Student's placement during a due process

The student's placement during due process depends on the nature of the appeal.If the parent is challenging a manifestation determination, the child remains in his or her current educational placement (the placement prior to suspension or removal) while the due process case is pending, 34 C.F.R. 300.524(c), unless an ALJ orders placement in a 45-day interim educational setting on the grounds of dangerousness, or the child was placed by the district in a 45-day interim educational setting due to illegal drugs or weapons.If a parent is challenging the interim educational setting or the manifestation determination of a child placed by the district in a 45-day interim educational setting due to illegal drugs or weapons, or placed by a hearing officer in such a setting on the grounds of dangerousness, the child remains in the interim educational setting until the expiration of the 45 days, or a decision by the ALJ on the parent's appeal, whichever occurs first, unless the parent and the district agree to another placement.20 U.S.C. § 1415(k)(7)(A); 34 C.F.R. 300.526(a).

If, at the end of a 45-day interim educational setting, the school district proposes a new educational placement to which the parent does not agree, the parent may request a due process hearing to contest the change in placement.In this case, while the due process case is pending, the child must be returned to his educational program prior to the 45-day removal, 20 U.S.C. § 1415(k)(7)(B); 34 C.F.R. 300.526(b), unless the school district requests emergency relief and the ALJ finds, under the standards discussed in this manual at pp. **, 34 C.F.R. 300.521(a)-(d), that the child is likely to cause substantial injury and that placement in interim educational setting is appropriate for an additional 45 days.34 C.F.R. 300.526(c)(1)-(3).

Students Not Yet Eligible For Special Education

A child is entitled to all of the discipline procedural protections discussed in this manual even if he or she is not classified as eligible for special education, if the school district knew or should have known that the student has a disability.20 U.S.C. § 1415(k)(8).In order for a child to have the protections of IDEA, the district's knowledge of the child's disability must be before the time of the violation of school rules.20 U.S.C. § 1415(k)(8)(A);Doe by Doe v. Board of Education of Elyira City Schoools, 28 IDELR 286 (6th Cir. 1998).

A school district is considered to have knowledge that a child has a disability if (1) the parent expressed concern to school personnel, in writing, that the child has a disability and needs special education (unless that parent cannot write, in which case verbal notice is sufficient); (2) the behavior or performance of the student demonstrates that the child has a disability and needs special education; (3) the parent submitted a written request for an evaluation; or (4) a teacher of the child or other district personnel expressed concern about the child's performance or behavior to the director of special education for the school district, child study team members, or school administrators responsible for referring children for evaluation.20 U.S.C. § 1415(k)(8)(B)(i)-(iv); 34 C.F.R. 300.527(b)(1)-(4).A school district is not considered to have knowledge that a child has a disability if it conducted an evaluation, determined that the child did not have a disability, and provided the parent with written notice of this determination.34 C.F.R. 300.527(c).

If a parent requests a special education evaluation for a non-classified child after the child has been suspended or expelled, the school district must conduct the evaluation on an expedited basis.20 U.S.C. § 1415(k)(8)(C)(ii); 34 C.F.R. 300.527(d)(2)(ii).The child is not entitled to any educational services during the time of removal, unless the school district normally provides services to children who have been suspended or expelled.34 C.F.R. 300.527(d)(2)(ii).In other words, the district must conduct a manifestation determination in accordance with 20 U.S.C. § 1415(k)(4) and 34 C.F.R. 300.523(a)(1).If the behavior leading to the long-term suspension or expulsion was a manifestation of the child's disability, the district must revoke the discipline and reinstate the student to his prior placement, or to a new placement using the procedures allowed for in the IDEA; if the behavior was not a manifestation of a disability, the district may continue the removal, but must provide FAPE in accordance with 20 U.S.C. § 1412(a)(1)(A) and 34 C.F.R. 300.121(d)(3)(ii).

The Rights of Children in Out-of-District Placements

A child with a disability placed by a school district in a private school is entitled to all of the discipline procedural protections granted to children attending programs in public schools.20 U.S.C. § 1412(a)(10)(B)(ii); 34 C.F.R. 300.401(c); B.H. v. Paterson School District and Windsor Academy, OAL Dkt No. EDS 1345-00 (February 4, 2000)(holding that OAL had jurisdiction over private school for children with disabilities, and that private school was bound by procedural requirements of IDEA.)Whenever such a child is subject to a short-term removal, the principal of the out-of-district school must send written notice, including the reasons for the removal, to the child's case manager.In the case of a change of placement or long-term removal, the out-of-district school may take disciplinary action only in conjunction with the child's school district, and the requirements of IDEA must be met.N.J.A.C. 6A:14-7.6(d).